No. 79-268

In the Supreme Court of the United States

OCTOBER TERM, 1979

FRANK STEARNS GIESE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-94) is reported at 597 F. 2d 1170. The prior opinion of the court of appeals (Pet. App. B-1 to B-61) was withdrawn from publication (see Editor's Note, 569 F. 2d 527).

JURISDICTION

The judgment of the court of appeals was entered on May 2, 1979. A petition for rehearing was denied on June 20, 1979 (597 F. 2d 1170). On July 6, 1979, Mr. Justice Stevens granted an extension of time for filing a petition for a writ of certiorari to and including August 19, 1979, and the petition was filed on August 18, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner was properly cross-examined with respect to a book that had been admitted into evidence.

2. Whether evidence of petitioner's constitutionally protected activities was properly introduced at trial.

3. Whether the prosecutor's remarks during closing argument deprived petitioner of a fair trial.

STATEMENT

Following a jury trial in the United States District Court for the District of Oregon, petitioner was convicted of conspiracy to destroy property of the United States, in violation of 18 U.S.C. 371[1] He was sentenced to five years' imprisonment and fined $10,000.[2] The court of appeals affirmed (Pet. App. A-1 to A-94).

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[1]Petitioner was acquitted of destruction of government property by means of an explosive (18 U.S.C. 844(f)), possessing a dynamite bomb (26 U.S.C. 5861(c)), carrying a firearm in the commission of a felony (18 U.S.C. 924(c)), and destroying government property valued in excess of $100 (18 U.S.C. 1361). A count charging misprision of felony (18 U.S.C. 4) was withdrawn during trial.

[2]One of petitioner's co-defendants, Lynn Meyer, pleaded guilty to the conspiracy count and testified for the government. Meyer was subsequently sentenced to five years' imprisonment. Three other co-defendants, James Akers, James Cronin and Chester Wallace, were convicted on several substantive counts. Cronin was also convicted of conspiracy; the conspiracy charge was dismissed as to Akers and Wallace because of prior convictions within the scope of the conspiracy. The co-defendants' convictions were affirmed on all counts except those charging the carrying of a firearm during the commission of a felony (18 U.S.C. 924(c)). *United States* v. *Akers*, 542 F. 2d 770 (9th Cir. 1976), and this Court denied certiorari, 430 U.S. 908 (1977).

The evidence at trial is fully described in the opinion of the court of appeals (Pet. App. A-2 to A-5, A-51). Briefly, it showed that petitioner was at the center of a conspiracy to bomb Navy and Army recruiting stations in Portland, Oregon. The bombings took place respectively on January 2 and January 4, 1973; in both instances, the buildings housing the recruiting centers as well as the surrounding neighborhoods suffered substantial damage (*id.* at A-2; Tr. 753-756, 766-767).[3] Petitioner did not directly participate in the first bombing, but he approved of his fellow conspirators' activities while criticizing their choice of a site in a low-income neighborhood as the target (Pet. App. A-4). Petitioner did help to plan the January 4 bombing of the Army recruiting station in a middle-class area, and he participated in that operation by carrying a gun and driving the others to and from the recruiting center (*id.* at A-4 to A-5). Petitioner also supplied weapons to his co-conspirators and provided them with money to rent an apartment that served as their headquarters (*id.* at A-4 to A-5). Petitioner subsequently counseled the other participants to refrain from further activities and go underground, but they refused (*id.* at A-5). After committing two additional robberies and plotting still other crimes, the group separated (*ibid.*). Petitioner and his co-conspirators were apprehended in February and March 1973.

In September 1973, after the end of the conspiracy but before petitioner's indictment, petitioner met with co-conspirator Max Severin's attorney and a legal assistant representing co-defendant Meyer. Petitioner learned at

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[3]Testimony also showed that petitioner participated in an unsuccessful burglary on December 12, 1972, that was intended to finance the conspirators' operations. The burglary failed when the alarm system sounded (Pet. App. A-3 to A-4).

the meeting that Severin had implicated him as the "leader and the planner of all of the illegal activities." Severin's attorney said he knew that petitioner had taken part in the abortive December 1972 robbery and that petitioner was the driver of the "getaway car" after the second bombing. Petitioner nodded and smiled in response and then said that the attempted robbery "hadn't gone as smoothly as planned" (Pet. App. A-51). Petitioner also admitted that he had driven the getaway car during the second bombing (Tr. 1554-1555). Petitioner further stated that he had his passport ready but was not really concerned because, even if he were to be convicted, it would be his first offense and he felt he could "handle" imprisonment (*ibid.*). Finally, petitioner said that "this [had] been an abortive mission from the beginning," that the others had not followed his directions, and that if they "had done it the way he planned it, they wouldn't have been caught" (Pet. App. A-51).

ARGUMENT

1. Petitioner contends (Pet. 17-24) that the contents of a book that had been introduced into evidence were improperly used to impeach him. The book, entitled *From the Movement Toward Revolution*, was admitted without objection[4] during the government's case-in-chief to prove association, because fingerprints of petitioner and three co-conspirators were found on it (Pet. App. A-28 to A-30). No mention of its contents was made until after petitioner had testified in his own defense and introduced more than a dozen books to show his peaceable character (*id.* at A-27, A-31, A-34 to A-37). In these circumstances, the government was properly allowed

[4]The sole claim raised by any of the defendants was that the book and other physical evidence had been seized in violation of the Fourth Amendment (Pet. App. A-28 n.16, A-30 n.18).

to rebut petitioner's character evidence by cross-examining him with respect to this book. As the court of appeals observed (*id.* at A-40):

> We are cognizant of the limitations inherent in the use of literature as proof of character, and we do not applaud the strategy employed by [petitioner] and his attorney. Nor do we bestow our imprimatur on the concept of trial by books. Nevertheless, the question before this court is not whether we think books are a persuasive form of character evidence; the issue is whether the government had a right to respond once the defendant had, of his own volition, chosen that method of proving he was a peaceable, law-abiding individual.[5]

[5]The court of appeals expressly recognized the narrowness of its decision (Pet. App. A-26 to A-27; footnote omitted):

> We reject [petitioner's] arguments, but in so doing we wish to emphasize that we are not establishing a general rule that the government may use a person's reading habits, literary tastes, or political views as evidence against him in a criminal prosecution. In many cases such evidence would be clearly inadmissible. See, *e.g.*, *United States* v. *McCrea*, 583 F. 2d 1083 (9th Cir. 1978). Our decision upholding the admissibility of *From the Movement Toward Revolution* stems from the peculiar circumstances of this case and, reflecting our concern for the sensitive nature of First Amendment values, it rests on very narrow grounds. We hold that it was proper to introduce the book during the government's case-in-chief because it bore the fingerprints of [petitioner] and three of his co-conspirators and thus tended to corroborate witnesses' testimony that the conspirators associated with each other. We further hold that it was proper to ask [petitioner] to read extracts from the book on cross-examination because he opened the door to that line of inquiry by introducing 18 books as evidence of his peaceable character during his own testimony on direct examination.

See *Michelson* v. *United States*, 335 U.S. 469, 479 (1948) ("The price a defendant must pay for attempting to prove his good name is to throw open the entire subject which the law has kept closed for his benefit and to make himself vulnerable where the law otherwise shields him."); cf. *McGautha* v. *California*, 402 U.S. 183, 215 (1971); *Brown* v. *United States*, 356 U.S. 148, 155 (1958); *United States* v. *Benedetto*, 571 F. 2d 1246, 1250 (2d Cir. 1978).

Nor was it improper for the district court to have petitioner rather than the prosecutor read the excerpts from the book during cross-examination. Petitioner did not object to this manner of presentation, and he has not shown that the court abused its broad discretion in this regard. See *Geders* v. *United States*, 425 U.S. 80, 86-87 (1976); *United States* v. *Perry*, 550 F. 2d 524, 532 (9th Cir.), cert. denied, 431 U.S. 918 (1977); *United States* v. *Hathaway*, 534 F. 2d 386, 401 (1st Cir.), cert. denied, 429 U.S. 819 (1976).[6]

2. In a related argument, petitioner contends (Pet. 24-30) that evidence of his political beliefs and activities, protected by the First Amendment, was improperly introduced against him. Specifically, he complains about the admission of the contents of *From the Movement Toward Revolution* and the use of testimony concerning his ownership of a "radical" bookstore at which several of the co-conspirators congregated, his dissemination of Socialist and Communist literature to prisoners, his

[6]Contrary to petitioner's assertion (Pet. 19), this evidence was not the "dispositive element" in petitioner's conviction. As discussed at pages 3-4, *supra*, there was ample evidence of petitioner's participation in the conspiracy. Moreover, it is implausible to believe that the use of the book inflamed the jury against petitioner; the jury in fact acquitted him on the four substantive counts.

lectures to groups at the state prison, and his advocacy of a book on urban warfare in American cities.[7]

Petitioner's claim is without merit. First, as the court of appeals noted (Pet. App. A-48), much of this evidence was admitted without objection. Moreover, the First Amendment has never been held to bar the government from presenting relevant evidence that bears upon constitutionally protected activities. Although the First Amendment prohibits the law from condemning as criminal that which is constitutionally protected, it does not render incompetent proof of such activities that is admissible under the applicable rules of evidence. See, *e.g.*, *Scales* v. *United States*, 367 U.S. 203, 255-257 (1961); *Yates* v. *United States*, 354 U.S. 298, 334 (1957); *United States* v. *Baumgarten*, 517 F. 2d 1020, 1029 (8th Cir.), cert. denied, 423 U.S. 878 (1975); *United States* v. *Donner*, 497 F. 2d 184, 192 (7th Cir.), cert. denied, 419 U.S. 1047 (1974); *United States ex rel. Epton* v. *Nenna*, 446 F. 2d 363, 367-368 (2d Cir.), cert. denied, 404 U.S. 948 (1971). Cf. *Epton* v. *New York*, 390 U.S. 29 (1968); *United States* v. *Zimeri-Safie*, 585 F. 2d 1318 (5th Cir. 1978); *United States* v. *Cafero*, 473 F. 2d 489, 503 (3d Cir. 1973), cert. denied, 417 U.S. 918 (1974); *United States* v. *Dellinger*, 472 F. 2d 340, 403 (7th Cir. 1972), cert. denied, 410 U.S. 970 (1973); *United States* v. *Spock*, 416 F. 2d 165, 168, 175-176 (1st Cir. 1969). As the Court explained in *Scales* v. *United States*, *supra* (367 U.S. at 256-257):

> We therefore need only consider whether the complained-of evidence was legally relevant and therefore admissible. * * * Of course, the preaching

[7]Petitioner challenges the introduction of this evidence solely on First Amendment grounds and does not raise any evidentiary objections to its admission at trial.

that the Negro population in the South has the right to form a separate nation does not of itself constitute illegal advocacy. But neither does the teaching of the abstract theory of Marxism-Leninism, which we have held cannot alone form the basis for a conviction for violation of the Smith Act, *Yates* v. *United States supra*; yet it cannot be seriously urged that evidence of such teaching is legally irrelevant to the charge. Similarly the evidence of the pamphlet on alleged American atrocities in Korea cannot be said to be irrelevant to the issue of illegal advocacy by the [Communist] Party. Once again, the pamphlet may not in itself constitute such an incitement to violence as would justify a finding that the Party advocated violent overthrow, but it is possible to infer from it that it was the purpose of the Party to undermine the Government in the eyes of the people in time of war as a preparatory measure, albeit legal in itself, to the teaching and sympathetic reception of illegal advocacy to violent revolution.

Here, the court of appeals correctly concluded (Pet. App. A-49 to A-50) that the evidence introduced at trial was relevant and admissible, and petitioner does not challenge that determination here. See note 7, *supra*.

It is clear from the record that the disputed evidence was not impermissibly used in this case to convict petitioner for his First Amendment activity. The district court emphasized to the jury that petitioner could be convicted only if the evidence proved every element of the offenses charged (Tr. 2213-2214). These elements did not relate to his beliefs or political expression, but rather focused on specific acts of criminal conduct (Pet. App. A-58 to A-59). The government in its closing argument emphasized to the jury that petitioner was not on trial for

the books he read or the political beliefs he held (*id.* at A-50). And, as discussed above (pages 3-4, *supra*), there was ample proof of petitioner's guilt without regard to this challenged evidence. In these circumstances, petitioner's First Amendment rights were not infringed.[8]

3. Petitioner also contends (Pet. 31-36) that he was denied a fair trial because of certain statements made by the prosecutor in closing argument. The court of appeals found that several of these statements were improper but that they did not warrant reversal of petitioner's conviction in the circumstances of this case (Pet. App. A-59 to A-62).

While we question the court of appeals' determination that the prosecutor's closing argument overstepped the bounds of "earnestness and vigor," *Berger* v. *United States*, 295 U.S. 78, 88 (1935),[9] we agree with its

[8]*Street* v. *New York*, 394 U.S. 576 (1969), and *Stromberg* v. *California*, 283 U.S. 359 (1931), upon which petitioner relies (Pet. 28-30), are inapposite. The statutes in *Street* and *Stromberg* purported to make constitutionally protected activity a criminal offense, and the Court could not determine from the general verdicts whether the defendants had been convicted for the exercise of their constitutional rights. Here, on the other hand, petitioner was convicted of a crime whose elements do not implicate First Amendment activities, and the record excludes the possibility that the jury, which was properly charged and had before it sufficient evidence of petitioner's guilt, convicted petitioner for the exercise of his constitutional rights.

[9]In our view a number of the prosecution's statements were proper responses to arguments raised by defense counsel. See, *e.g.*, *United States* v. *Bishop*, 534 F. 2d 214, 220 (10th Cir. 1976); *United States* v. *Isaacs*, 493 F. 2d 1124, 1164 (7th Cir.), cert. denied, 417 U.S. 976 (1974). For example, the prosecutor's characterization of petitioner as a "wolf in sheep's clothing" (Tr. 2180) was simply an apt phrase, fully justified by the evidence at trial, in response to petitioner's claim that his life had been dedicated to non-violence (Tr. 2083-2084). Similarly, as a result of the defendants' having labelled co-conspirator Meyer as "sick" (Tr. 2094-2096, 2139, 2153), the prosecutor agreed and asserted

assessment that reversal is not required. Petitioner did not object to the prosecutor's remarks or request a curative instruction and instead raised the issue for the first time on appeal (Pet. App. A-61). The prosecutor's comments were at least invited, if not wholly justified, by the presentation of defense counsel (Pet. App. A-63 n.30; see also note 9, *supra*). And, as the court below observed (Pet. App. A-62; see also pages 3-4, *supra*), "[a] large amount of evidence, unaffected by anything the prosecution did during its final arguments, connected [petitioner] to the conspiracy. Absent the prosecution's improper remarks, the jury still would have found him guilty." In this situation, no plain error is presented and the court of appeals correctly affirmed petitioner's conviction.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

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that everyone who was involved in the instant conspiracy was equally "sick" (Tr. 2174-2175). The prosecutor's comments tending to vouch for the government witnesses' credibility (Tr. 2166-2167, 2171-2173, 2175) were in response to defense counsel's allegations that the government had "purchased" witnesses' testimony or that their testimony was the product of bribery (Tr. 2091, 2149, 2153, 2158). Finally, the "slightly overblown" reference (Pet. App. A-60) to *From the Movement Toward Revolution* was, as the court below recognized (Pet. App. A-62 to A-63 n.30), provoked by one defense counsel's reference to it as a "song book" and other counsel's invitation to the jury to read portions of it.

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